2010

Peterson Hunting v. Labor Commission of Utah, Nicholas Jay Frohardt : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PETERSON HUNTING,	:	Court of Appeals
Petitioners/Appellants,	:	Priority 7
vs.	:	
LABOR COMMISSION OF UTAH, and the NICHOLAS JAY FROHARDT,	:	Labor Commission No.: 09-0501
	:	Appellate Case No.: 20100577
Respondents/Appellees	:	

REPLY BRIEF OF APPELLANTS

Appeal from the Utah Labor Commission

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PETITIONERS RESPECTFULLY REQUEST ORAL ARGUMENT AND THAT THIS CASE BE REPORTED.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Statutes

Cases

ARGUMENT

THE COMMISSION ERRED IN AWARDING WORKER'S COMPENSATION BENEFITS SINCE PETERSON HUNTING IS AN "AGRICULTURAL EMPLOYER" AND PAID NON-IMMEDIATE FAMILY MEMBERS LESS THAN $8,000.00 IN THE 2007.

A. *A Correction of Error Standard Applies to the Interpretation and Application of 32A-2-103 and 35A-4-206*

Frohardt is correct that Utah's courts require the Workers' Compensation Act to be liberally construed and applied to provide coverage to injured workers. However, an injured worker must still establish the necessary statutory elements and establish that he or she is legally entitled to those benefits.

Frohardt also challenges the standard of review cited by Peterson Hunting and argues the correct standard of review for statutory interpretation and application of 34A-2-103 and 35A-4-206 in this case is an "abuse of discretion" standard. We disagree and submit that a correct of error standard applies, giving no deference to the lower court.

Under Utah Code Ann. § 63G-4-403 (4)(d), the Court of Appeals may grant relief from an agency action if the agency "has erroneously interpreted or applied the law." Whether an agency has properly interpreted or applied agency-specific law is reviewed for correctness. See Harrington v. Industrial Comm'n, 942 P.2d 961, 963 (Utah Ct. App.

1997); Terry v. Ret. Bd., 2007 UT App 87, ¶7 (Utah Ct. App. 2007); Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997).

In Harrington v. Industrial Comm'n, Dep't of Empl. Sec., 942 P.2d 961, 963 (Utah Ct. App. 1997), the court held:

> Under Utah Code Ann. § 63-46b-16(4)(d) (1993), we may grant relief from an agency action if the agency "has erroneously interpreted . . . the law." "'We review statutory interpretations by agencies for correctness, giving no deference to the agency's interpretation, unless the statute grants to the agency the discretion to interpret the statute.'"

Id.

Moreover, in Terry v. Ret. Bd., 2007 UT App 87, P7 (Utah Ct. App. 2007) the court held:

> Challenges to an agency's legal conclusions of general law best fall under Utah Code section 63-46b-16(4)(d), which allows an appellate court to grant relief when an agency has "erroneously interpreted or applied the law." Utah Code Ann. § 63-46b-16(4)(d). We review an agency's legal conclusions for correctness, giving no deference to the agency's decision. See Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997).

Id.

Given the above strictures, it is evident that the challenges raised by Peterson Hunting involve the interpretation of 34A-2-103 and 35A-4-206 of the Utah Code and application of this agency-specific law to this

case. Given these challenges, review of these issues by this Court is under a correction of error standard of review.

B. ***Peterson Hunting is Not Remiss in Its Duty of Marshalling the Factual Findings.***

Frohardt also argues that Peterson Hunting failed to meet their marshalling duty. We disagree. Since the Commission's Order and, specifically, determination of "agricultural employer" involves a question of law (rather than fact), there is no need to marshall that evidence. Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998) (noting challenging party's duty to marshall factual findings).

In addition, although the ALJ's determination regarding the amount of Frohardt's wages are clearly factual findings, this issue was not addressed by the Commission (since the other legal issue regarding agricultural employment was dispositive). Accordingly, Peterson Hunting cannot marshall the non-existence evidence from the Commission. To properly marshall this finding would require that the Commission address this issue and find favorably for Frohardt. They have no yet done so with regard to the issue of his wages.

C. ***Peterson Hunting Did not Exceed the Wage Threshold in 2007 Wages to Non-Immediate Family Members***

Peterson Hunting argues that it is not an employer of Frohardt since in 2007 its payroll of non-immediate family members was less than $8,000.00. Indeed, Utah Code Ann. § 32A-2-103(5)(c) reads as follows:

> (c) For purposes of this chapter and Chapter 3, Utah Occupational Disease Act, an agricultural employer is not considered an employer of a nonimmediate family employee if:
>
> > (i) for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees was less than $ 8,000

Utah Code Ann. § 34A-2-103. (Emphasis added)

Appellee Frohardt argues that Peterson Hunting exceeded the wage threshold to non-immediate family members in 2007. He argues that the ALJ correctly found that Peterson Hunting's payment to non-immediate family members in 2007 totaled $8,217.00, over the $8,000.00 limit required by Utah Code Ann. § 32A-2-103(5)(c). We disagree.

Assuming that Peterson Hunting qualifies as an agricultural employer, the Commission must still evaluate if Peterson Hunting is exempt from being considered an "employer" by virtue of failing to satisfy

the necessary wage threshold to non-immediate family members. Peterson Hunting submits that it paid non-immediate family employees less than $8,000.00 in 2007, therefore exempting it from "employer" status under the statute.

Frohardt argues that the wages paid by Peterson Hunting to non-immediate family members in 2007 totaled $8,215.19 which he submits are as follows:

1. $3,000.00 to Reece Potter as wages.
2. $4,000.00 to Nicholas Frohardt as wages. (Paid by Check). Tr., 127.
3. $765.19 to Nicholas Frohardt as for his wages. (A check to Frohardt for an investment to the ethanol company). Tr., 127-128.
4. **$450.00 to Nicholas Frohardt as for his wages**. ($500.00 less $50.00 used for personal expenses).

There is no dispute as to items 1, 2 and 3. Peterson Hunting agrees these qualify as wages. However, the dispute arises as to item 4 – the $500.00 paid directly to Frohardt from Kurtley Peterson between August 2007 and September 2007 when Peterson went away on a trip and gave Frohart $500.00 in cash. While Peterson Hunting, through

Kurtley Peterson, gave Frohardt $500.00 to "run the business" while Mr. Peterson was out of town between August 2007 and September 2007, testimony at hearing showed that the $500.00 was meant for business expenses while Mr. Peterson, the owner of the business, was away.

Kurtley Peterson testified:

Q. And now you've heard testimony that shortly after he got there, you went to a concert, you paid him $500. He's classified or deemed that as you paid him wages.

A. Okay, let --

Q. Did you pay him wages for that?

A. That $500, you see, this is my operation up there, it's my mules, my everything, okay. I buy the fuel, I buy the - - groceries, everything, okay. Well, some good friends of ours invited us to go that concert. Well, it's right in the heat of the action, I only had three, four, or five days before I have hunters coming in, I had things to get done. We was running water lines, we were building floors, we was going to the lumbar store and buying material, and just a lot of costs. Okay, if I'm there, I would just write checks and letting - - get the bills paid.

Well, the day I left, I handed $500 to Nick and says, Nick, here is $500, buy anything you need. If we need something at this camp, I don't want a check there with no money. So that $500 was given to Nick to buy material, groceries, whatever it was. If he needed gas for the four-wheeler, if he needed tires for the four-wheeler, he was running the four-wheeler back and forth up the mountain, and that's a mean, mean road, he didn't have the money to buy tires for the four-wheeler and I was over in Reno, Nevada, that's what that money was for.

Q. So it was your intent that that money was meant to give to him to run the operations while you were gone.

A. One hundred percent. In fact, now - - now, my mind is I'm not 100 percent sure on this, but I believe I got back in that tent that next week and Nick tried to give me that $500 - - the change of the $500 back to me. And I said, no, Nick, there's going to be other times that I'm gone that you need some money (inaudible) around town and that truck needs gas, you fill it up, you've got my money to fill that truck up.

Q. So this is an advancement for business operations if you aren't there to pay it.

A. Well he needed - -my business, he needed to run on my money. I didn't expect him to be spending his money.

(Tr., 122-124).

Contrary to Frohart's argument, the $500.00 was never meant as wages to him and no evidence was introduced that Frohardt ever reported that money as wages. In fact, it is undeniable that Frohardt **did not pay taxes on this money** and to Peterson Hunting's knowledge still has not paid taxes on the money despite his "forgetting." Rather, contrary to Frohardt's testimony, Peterson Hunting representative Kurtley Peterson told Frohardt that he should use the money for company expenses while the owner (himself) was out of town – which included using the money to buy gas for work vehicles, maintenance supplies and food for guide trips. See Tr, 123-124. While Frohardt is correct, that there was no formal written agreement as to the use of this money, it would make little sense for Peterson Hunting to pay "wages" to Frohardt in this manner when the other wage payments were made to

him by more formal means (i.e, check) and were reported by Peterson Hunting as wages in Frohardt's tax records. Indeed, in Peterson Hunting's 2007 tax return, the $500.00 was not listed as wages to Frohardt. Tr., 129-31; R, 129. Rather, the cost of labor totaled $7,765 (the total of only items 1, 2 and 3 above).

On this basis, the underlying order of the ALJ was incorrect in finding that Frohardt's wages totaled $5,215.00 for 2007.

Frohardt also argues that even if the $500.00 is not considered wages, other "like kind" good and services provided to non-immediate family members by Peterson Hunting qualify as "wages" sufficient to satisfy the $8,000.00 statutory requirement. He cites to purported benefits including: room and board, meals, transportation to and from the mountain, clothing, hunting equipment and other items. We disagree. The so claimed "benefits" are nothing more than simple living arrangements and were never considered as monetary gain. No taxes were paid on the alleged benefits nor was such a claim or argument presented by Mr. Frohardt for judicial review in this case regarding these "benefits" qualifying as wages. Moreover, the ALJ did not enter factual findings or conclusions of law regarding whether these goods and services provided to Mr. Frohardt qualify as wages.

D. Peterson Hunting Is An Agricultural Employer.

Frohardt argues that Peterson Hunting is not an agricultural employer. He argues that the agricultural exception is meant for small family run farms that need to employ a non-immediate family member for a limited occasion such as for additional help during a crop harvest. However, Frohardt provides no evidence to support his argument regarding such "intent" or purpose of the agricultural employer exemption.

Under Utah law, an agricultural employer is not considered an employer of a nonimmediate family employee if for the previous calendar year the agricultural employer's total annual payroll for all nonimmediate family employees was less than $8,000. Contrary to Frohardt's argument, and pursuant to Utah law which requires that the term agricultural worker be interpreted broadly, Peterson Hunting qualifies as an agricultural employer under the applicable statutory provisions.

Utah Code Ann. § 32A-2-103(5)(a)(i)(A) reads as follows:

> (5) (a) As used in this Subsection (5):
>
> (i) (A) "agricultural employer" means a person who employs agricultural labor as defined in Subsections 35A-4-206(1) and (2) and does not include employment as provided in Subsection 35A-4-206(3); . . .

Utah Code Ann. § 32A-2-103(5)(a)(i)(A).

In addition, Utah Code Ann. § 35A-4-206(1)(a) reads:

> (1) "Agricultural labor" means any remunerated service performed after December 31, 1971:
>
> (a) on a farm, in the employ of any person in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, **feeding,** caring for, training, **and management of livestock**, bees, poultry, and **fur-bearing animals and wildlife**;

Utah Code Ann. § 35A-4-206.

Frohardt first argues that to qualify as "agricultural laborer", the agricultural labor must take place on a farm or ranch. This is incorrect. In fact, it can occur on a farm or elsewhere as noted in Utah Code Ann. § 35A-4-206(1)(a) which reads:

> (1) "Agricultural labor" means any remunerated service performed after December 31, 1971:
>
> (a) on a farm, in the employ of any person in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

Utah Code Ann. § 35A-4-206.

Frohardt also argues that none of his duties involved raising or harvesting of an agricultural commodity. He disagrees that the work duties involve raising, shearing, feeding, caring for, training, or management of livestock, or fur-bearing animals and /or wildlife. Again,

we disagree. Not only did Peterson Hunting operate as a **guiding service to hunt game** but it also included the **feeding of and management of livestock and wildlife**. (Tr., 118-122). Under the applicable statute, agricultural labor includes the management of livestock and/or wildlife. The nature and function of Peterson Hunting's business not only included hunting for sport but also included the feeding, harvesting and management of wildlife as well as the feeding and management of livestock, in partnership with the state of Utah.

Mr. Frohardt argues that Peterson Hunting is not involved in the "management" of livestock or wildlife since the business did not determine which elk or deer the hunters should shoot. He interprets the statute to narrowly. While Peterson did not choose the elk or deer the hunters should shoot, hunters were encouraged by Peterson to shoot wildlife with mis-matched antlers ("points") to allow for selective breading of more desirable animals – those with matching points. Moreover, Kurtley Peterson has owned Peterson Hunting since 1993 which is in the business of guiding sportsmen on hunting expeditions on Boobe Hole mountain and managing wildlife in this area. Mr. Peterson testified that as part of its business, Peterson Hunting regularly met with the state of Utah Cooperative Wildlife Management Unit to decide how many

animals, including elk and deer, need to be killed and harvested to ensure proper ratios and to guarantee that there was enough food on the mountain for other cattle (ie., cows) (Tr., 118, 124). Given this, Peterson Hunting would clearly help the state of Utah **manage and maintain the wildlife and livestock population on the mountain.** (Tr., 119). The state of Utah would compensate Peterson Hunting by giving them money for assisting them in the harvesting and management of deer and elk wildlife population. The state of Utah would also give Peterson Hunting a set amount of "kill" tags (to sell or use) as part of this process. (Tr., 121).

Frohardt also submits that Peterson Hunting did not feed the livestock and wildlife. We disagree. As part of this business, Petersen Hunting constructed a water line to water troughs on this mountain to assist in the feeding of the wildlife (as well as their own guiding mules) and also distributed salt (laced with nutrients) intended to provide nutrients for the livestock (ie. cattle). By hunting certain wildlife, Peterson Hunting assisted in the feeding of the cattle by ensuring that enough food remained on the land for the livestock. Hunters on their guiding expeditions were also encouraged to shoot only certain wildlife to allow for selective breeding of more desirable animals. Based upon this,

Peterson Hunting's business is subject to the agricultural exception since their business is *"connected with"* the harvesting, feeding of and/or management of livestock and wildlife.

The business of hunting elk and deer wildlife, feeding and watering these animals, and managing the land upon which they reside (to ensure proper population ratios for deer, elk and cattle), upon the direction and supervision of the state of Utah, qualifies Peterson Hunting as performing agricultural labor under Utah Code Ann. § 35A-4-206. The fact that Peterson Hunting profited from its business does not nullify the fact that through its business, another purpose was also served — the management of livestock and wildlife.

Frohardt attempts to narrow the definitions of agricultural labor to include only those commodities that are grown in the soil. However, the statute clearly states that management of livestock and wildlife are included as agricultural labor. Mr. Frohardt fails to recognize that the Utah Supreme Court has clearly stated in *Davis v. Industrial Comm'n,* 59 Utah 607, 608-611 (Utah 1922) that the term agricultural worker should be applied broadly, rather than narrowly. Frohardt's interpretation of this statute is far too narrow and is, therefore, contrary to Utah Supreme

Court precedent. Peterson Hunting would ask this court to follow this precedent and interpret these statutes broadly in the present action.

CONCLUSION

The Commission's Order should be reversed. Peterson Hunting qualifies as an agricultural employer. The Commission's ruling to the contrary is overly narrow and is contrary to the express mandates of Utah law requiring a broad interpretation of this statutory term.

Respectfully submitted this 23rd day of June, 2011.

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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 23rd day of June, 2011, to:

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